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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 506

JACOB B. ZIMMERMAN, ET AL.,
Petitioners,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY, ET AL.,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AS AMICUS CURIAE.

KENNETH F. BURGESS,
GEORGE RAGLAND, JR.,
WALTER J. CUMMINGS, JR.,
Attorneys for Thomas Campbell, et al., being the Committee for Preferred Stockholders of Chicago Great Western Railway Company.

SIDLEY, AUSTIN, BURGESS & SMITH,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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To the Honorable, the Chief Justice and the Associate Justices of the United States:

Now come Thomas Campbell, James A. Clark, Roy Doolittle, W. F. Rosar and Leo L. Tully, who make up the Committee for Preferred Stockholders of Chicago Great Western Railway Company, by their attorneys, and respectfully move the Court for leave to file as *amicus curiae* a brief of 11 printed pages, which is tendered herewith under separate cover, in opposition to the petition for a writ of certiorari in this cause. In support of the motion, the Committee respectfully shows:

1. Counsel for petitioners have refused their consent to

the filing of the brief *amicus curiae;* counsel for respondent have given their consent, a copy of which is attached hereto;

2. The Committee represents 769 stockholders, holding 120,737 out of approximately 364,000 shares of the 5% preferred stock of the Chicago Great Western Railway Company, who have authorized the Committee to oppose the impounding of their dividends as security for the legal fees and expenses of petitioners and their attorneys in this action;

3. The Committee was organized subsequent to the entry of the orders now before this Court. It has now intervened in the District Court in opposition to the claims of the petitioners, including their claim to represent all preferred stockholders in this lawsuit. In addition, the Committee was permitted to file briefs and to participate in oral argument as *amicus curiae* in the Court of Appeals for the Seventh Circuit, whose decision petitioners now seek to have reviewed.

4. While respondent has undertaken the burden of representing the interest of the preferred stockholders in receiving their full dividends without deduction for the fees and expenses of petitioners and their attorneys, movant Committee is authorized to speak in behalf of a large group of preferred stockholders, who are the persons immediately and directly affected by the impounding of portions of the preferred stock dividends. It was their money which was seized by the orders of the District Court. Furthermore, it is these persons whom petitioners now claim to represent by the class action device. Their interest in disputing these propositions is therefore immediate and direct.

5. In its briefs in the Court of Appeals, movant Committee adopted a different approach to the question of the power of the District Court to impound the dividends here

involved than that of respondent, citing and discussing a number of cases not mentioned in respondent's brief. Movant also presented arguments against the existence of a class action which were not contained in respondent's brief. It is movant's belief that respondent will not present the arguments which the Committee urged before the Court of Appeals and which, it is believed, will be helpful to this Court in fully understanding the issues presented.

For these reasons, movant Committee believes that its brief in opposition to the petition for certiorari should be read and considered by the Court.

Respectfully submitted,

KENNETH F. BURGESS,
GEORGE RAGLAND, JR.,
WALTER J. CUMMINGS, JR.,
Attorneys for Thomas Campbell, et al., being the Committee for Preferred Stockholders of Chicago Great Western Railway Company.

SIDLEY, AUSTIN, BURGESS & SMITH,
Of Counsel.

February, 1951.

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PETITIONERS' OBJECTIONS TO MOTION FOR LEAVE TO FILE BRIEF AMICUS.

BEN W. HEINEMAN,
ALEX ELSON,
HUBERT H. NEXON,
JOSEPH A. RUSKAY,
Attorneys for Petitioners.

SWIREN & HEINEMAN,
135 South LaSalle Street,
Chicago 3, Illinois,
Of Counsel.

The Scheffer Press, Inc.—ANdover 3-6850

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Respondent.

PETITIONERS' OBJECTIONS TO MOTION FOR LEAVE TO FILE BRIEF AMICUS.

I.

The motion of the opposition committee ("Campbell Committee") for leave to file a brief *amicus* is in substance and effect an attempt by Richard J. Buck, an appellee below, to attack orders from which he has not appealed. Mr. Buck, a member of the brokerage firm of Richard J. Buck & Company, was permitted to, and did intervene in the trial court as a representative of more than 54,000 shares of preferred stock (R. 109-112). He successfully opposed the entry of the orders here involved (R. 120). Mr. Buck was represented in the trial court by the same attorneys as here represent the Campbell Committee (R. 109, 110, 111). Mr. Buck did not appeal and his appearance as appellee was entered in the Court of Appeals by these same attorneys (R. 161).

Subsequent to the appeals, the Campbell Committee was organized, and solicited authorizations from the preferred shareholders to oppose both the impounding orders here involved and the merits of the complaint. On the basis of the authorizations so obtained, the Court of Appeals granted the Campbell Committee leave to appear and be heard as *amicus curiae*. Thereafter, petitioners presented evidence to the Securities and Exchange Commission that the solicitation of the Campbell Committee had been false and misleading in that it failed to disclose that the Campbell Committee had been organized by Richard J. Buck, the intervenor below, and that it had also failed to disclose that one Robert McAteer, a director of the defendant railroad, was a partner of Richard J. Buck & Co. On this evidence the Securities and Exchange Commission "recommended" that the Campbell Committee discard all existing authorizations and resolicit, making disclosure of the facts previously withheld.

This was done by a new letter of solicitation dated December 5, 1950. In that letter, under the compulsion of the Securities and Exchange Commission's recommendation, the Campbell Committee made clear that it was but the *alter ego* of Richard J. Buck, intervenor in the trial court and appellee below. Thus the letter of December 5, 1950 says:

> "In July of this year, Thomas Campbell, James A. Clark, Roy W. Doolittle, W. F. Rosar and Leo F. Tully, Sr., who are clients or business associates of Richard J. Buck, with his active support and cooperation, formed the Committee for Preferred Stockholders of Chicago Great Western Railway Company . . . A committee form of organization was adopted in order that the owners of preferred stock might appear before the Court in their own behalf, . . . and

> so that the burden of the lawsuit might be shifted in part from Mr. Buck to some Preferred Stockkholders.
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> • • •
>
> "The members of the Committee and Mr. Buck will meet all of its expenses, including counsel fees."

In addition, depositions of members of the Campbell Committee taken by petitioners disclose that the records of the Committee were kept among the personal files of Richard Buck, rather than in the custody of the Committee's secretary, and that Richard Buck made all arrangements with the attorneys to represent the Campbell Committee, the Committee having theretofore had no meetings.

From the foregoing facts, it is apparent that the Campbell Committee is but another name for the intervenor, Richard J. Buck, and that at least 54,970 shares of the preferred stock that the Campbell Committee now claims to represent were represented by Richard J. Buck as intervenor in the trial court, and as appellee in the Court of Appeals (R. 109-110).

It is settled that an appellee may not attack a judgment. As this Court put it in *LeTulle* v. *Scofield,* 308 U.S. 415, 421 (1940):

> "A respondent or an appellee may urge any matter appearing in the record in support of a judgment, but he may not attack it even on grounds asserted in the court below, in an effort to have this Court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him." (Footnotes omitted.)

It would plainly be subversive of this long established rule to permit an appellee, such as Richard J. Buck, to attack the District Court's orders by indirection through a cat's paw committee, when he could not do so directly,

or conversely, to permit persons represented by Buck, for tactical purposes, to avoid the consequences of that representation.

II.

The representative character of the Campbell Committee is suspect and affected by conflicts of interest. As already noted, because of a false and misleading solicitation, the Campbell Committee found it necessary to discard all authorizations received pursuant thereto. In addition, as Richard J. Buck's motion to intervene disclosed he and Richard J. Buck & Co. owned or represented 70,395 shares of common stock (R. 109), the interest of which is diametrically opposed to that of the preferred stock in the pending litigation. The solicitation letter of December 5, 1950 discloses that Richard J. Buck & Co. and its clients then owned approximately 77,668 shares of common stock, and that the individual members of the Campbell Committee owned 19,500 shares of common stock.

Moreover, Robert McAteer, a director of the defendant railroad in the principal litigation, is a partner of Richard J. Buck in the firm of Richard J. Buck & Co.

III.

We have urged in the petition for certiorari that the defendant railroad was without an interest sufficient to give it standing to appeal from the District Court's orders. If such a jurisdictional defect exists, the Campbell Committee can not cure it by filing a brief *amicus*. There is no showing made and no reason to assume that the answer of the railroad, as respondent here, will not fully expose the other issues.

For the reasons hereinabove set forth, the motion of the Campbell Committee for leave to file a brief as *amicus curiae* in opposition to the petition for certiorari should be denied.

Respectfully submitted,

BEN W. HEINEMAN,
ALEX ELSON,
HUBERT H. NEXON,
JOSEPH A. RUSKAY,
Attorneys for Plaintiffs.

SWIREN & HEINEMAN,
135 South LaSalle Street,
Chicago, Illinois,
Of Counsel.